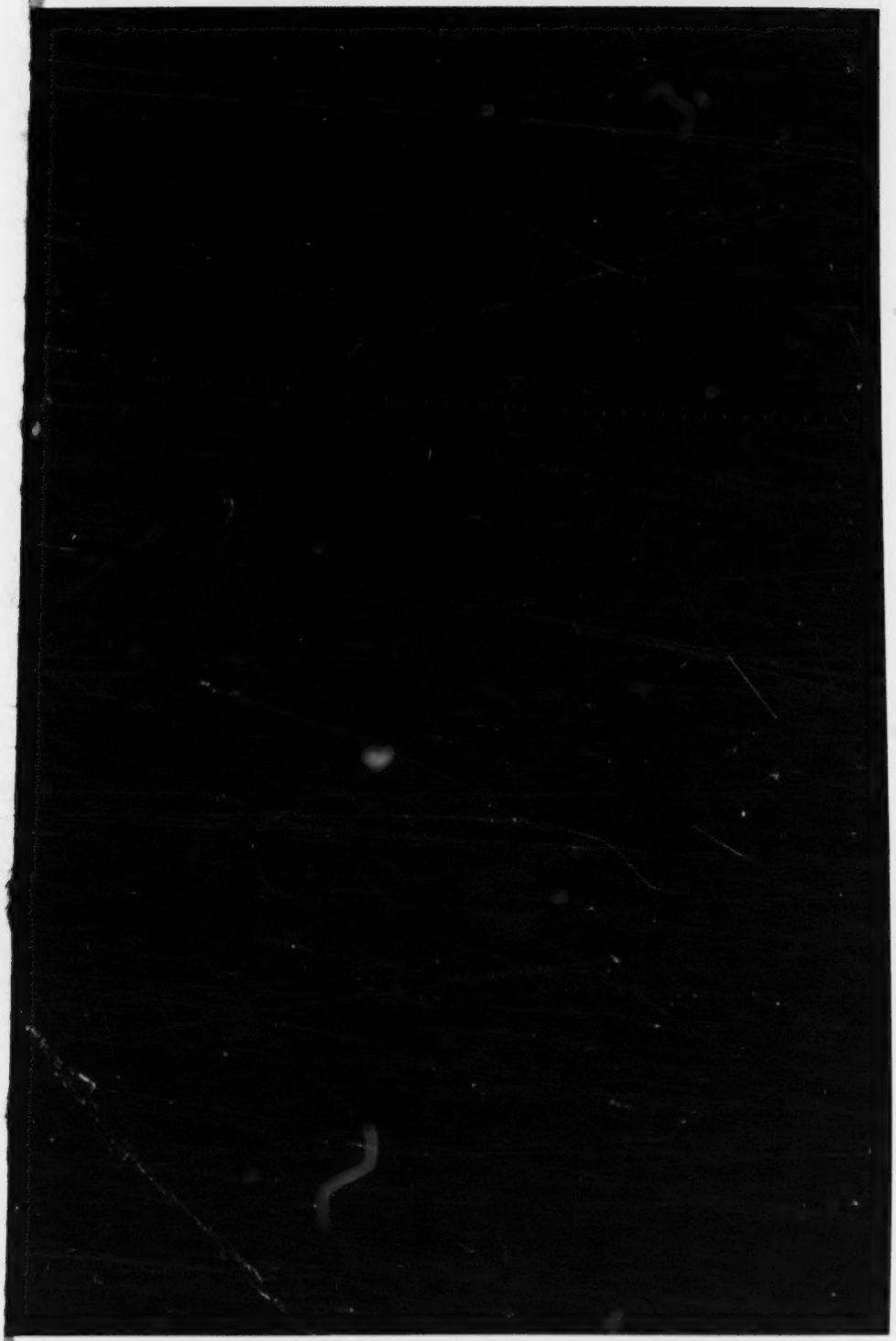

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

LOUISVILLE LODGE NO. 6, FRATERNAL ORDER OF POLICE, and
BERT J. HEUSER - - - - - - *Petitioners*

v.

GEORGE BURTON, Director of Public Safety and
LOUISVILLE CIVIL SERVICE BOARD - *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The Respondents, George Burton, Director of Public Safety, and Louisville Civil Service Board, respectfully pray that the writ of certiorari petitioned for in the above styled case be denied.

STATEMENT OF THE CASE

Respondents agree with Petitioners' Statement of the Case except for that which states that, "An appeal was taken to the Louisville Civil Service Board which refused to act on the matter and the lawsuit herein was commenced." It is the impression of Respondent that the Petitioner elected a remedy through the State Court rather than the Civil Service Board.

LACK OF JURISDICTION

The Respondent respectfully submits that this Honorable Court is without jurisdiction to grant a writ of certiorari. The Petitioners, Louisville Lodge No. 6, Fraternal Order of Police, and Bert J. Heuser invokes jurisdiction under 28 U.S.C. §1257(3). Such statute states: "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is *drawn in question* or where the validity of a State statute is *drawn in question* on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is *specially set up or claimed* under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

In Petitioners' Brief to the Court of Appeals of Kentucky it is stated: "Appellant wishes to emphasize that the constitutionality of KRS 90.220 or 95.015 is *not* being questioned, but rather that these statutes specifically indicate which activities civil service employees are precluded from engaging in; and had the legislature desired to prohibit civil service employees from being candidates in public elections they would have included such clause in KRS 90.220."

The Opinion of the Jefferson Circuit Court, Chancery Branch, Fourth Division, in deciding the case in favor of Respondents, states: "Suffice it to say that

constitutionality of the statutes at issue in this action have *not* been challenged by the plaintiff and, therefore, should *not* be decided by this court." (Page 23 of Petitioner's Petition for Certiorari.) And in the Opinion of the Court of Appeals of Kentucky affirming, it is stated: "The appellants do *not* in terms argue that KRS 90.220(2) is unconstitutional". (At page 26 of Petitioner's Petition for Certiorari.)

The following are a list of cases in which the Supreme Court has held lack of jurisdiction under 28 U.S.C. 1257(3) because the constitutionality of the statute in issue was not raised in the lower courts.

1. *Memphis Natural Gas Company* v. *Roy H. Beeler,* 315 U. S. 649, 86 L. Ed. 1090, 62 S. Ct. 857 (1941) (at 315 U. S. 649 page 651).

"Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state Supreme Court to be in issue, we must dismiss the appeal for want of jurisdiction."

2. *Murdock, et al.* v. *The Mayor and Aldermen of Memphis, et al.,* 87 U. S. 583, 22 L. Ed. 429, 20 Wall 590 (1874).

This case discusses the original of 28 U.S.C. 1257(3) passed in 1867 entitled "An Act to Amend an Act to Establish the Judicial Courts of the United States". 14 Stat. at L., 365, at 22 L. Ed. 441.

"But we have not yet considered the most important part of the statute, namely, that which declares that it is only upon the existence of certain questions in the case that this court can entertain jurisdiction at all.

Nor is the mere existence of such a question in the case sufficient to give jurisdiction—the question must have been decided in the State Court. . . ."

3. *Levy* v. *Superior Court of the City and County of San Francisco,* 167 U. S. 175, 42 L. Ed. 126, 17 S. Ct. 769 (1896). Court dismissed writ of error for want of jurisdiction.

". . . he did not, in the State court, draw in question any statute of the state upon the ground that it was repugnant to the Constitution of the United States, nor specially set up or claim in that court any right, title, privilege, or immunity under the Constitution of the United States . . . If the plaintiff intended to claim that the statute in question was repugnant to the Constitution of the United States, he should have so declared." (at pages 126-127).

4. *Scudder* v. *New York,* 175 U. S. 32, 44 L. Ed. 62 (at 63-64), 20 S. Ct. 26 (1899).

"No mention of the Constitution of the United States or of any provision thereof, by the plaintiff in error, or by the Court, is to be found at any stage of the case while it was pending in the courts of the state of New York . . . In order to give this court jurisdiction of a writ of error to review a judgment which the highest court of a state has rendered in favor of the validity of a statute of or an authority exercised under a state, the validity of the statute or authority must have been "drawn in question . . . on the ground of their being repugnant to the Constitution, laws or treaties of the United States." When no such ground

has been presented . . . this court has no jurisdiction."

5. *Mellon* v. *O'Neil,* 275 U. S. 212, 72 L. Ed. 245 (1927) at U. S. 214.

"It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court."

6. *Republic Natural Gas Company* v. *State of Oklahoma,* 334 U. S. 62, 92 L. Ed. 1212, at page 122, 68 S. Ct. 972 (1947). Citing *Memphis Natural Gas Co.* v. *Beeler,* the court says: "Appellant, of course, has the burden of affirmatively establishing this court's jurisdiction."

7. *Edelman* v. *California,* 344 U. S. 357, 97 L. Ed. 387, 73 S. Ct. 293 (1952) at page 391.

"It is clear that this court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

8. *Michigan Central R.R. Co.* v. *Michigan Southern R.R. Co.,* 60 U. S. 378, 19 How. 378, 15 L. Ed. 689 (1856) (at page 689).

"In order to give this court jurisdiction under the 25th section of the Judiciary Act, the record of the case must show by direct averment or necessary intendment, that one of the questions enumerated in that

section did arise, and was ~~divided~~ decided by the state court, as required."

9. *Jett Brothers Distilling Co.* v. *City of Carrollton,* 251 U. S. 1, 64 L. Ed. 421, 40 S. Ct. 255 (1919) (at page 423) (Ky. case).

"In order to give this court jurisdiction by writ of error, under amended §237, Judicial Code, it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis of a writ of error from this court. There must be a substantial challenge of the validity of the statute or authority, upon a claim that it is repugnant to the Federal Constitution, treaties, or laws, so as to require the state court to decide the question of validity in disposing of the contention."

QUESTIONS PRESENTED

1. Whether Kentucky Revised Statutes 90.220(2) prohibits a police officer employed by a city of the first-class from becoming a partisan candidate for the office of Alderman on the Board of Aldermen of the City of Louisville?
2. Whether the actions of the City of Louisville Chief of Police in suspending the Petitioner, Bert J. Heuser, because he became a candidate for the office of Alderman was arbitrary, capricious, and a violation of his rights under the Constitution of the United States or under other laws?

Even if this Honorable Court had jurisdiction in the above styled case, the case of *U.S. Civil Service Commission* v. *National Association of Letter Carriers,* 413 U. S. 548, 37 L. Ed. 2d 796, 93 S. Ct. 2880, would be controlling in this situation. In *U. S. Civil Service Commission* v. *National Association of Letter Carriers, supra,* there was in question that portion of the Hatch Act (codified in 5 U.S.C. §7324(a)(2)), which prohibits federal employees from taking "an active part in political management or in political campaigns". The provisions have been attacked on grounds of (1) infringement on First Amendment rights of federal employees and (2) vagueness and overbreadth.

In upholding the constitutionality of the Act from a First Amendment standpoint, the Court quotes from *Pickering* v. *Board of Education,* 391 U. S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). This Court has recognized a balancing test weighing the interests of the employer in regulating the political activities of its employees as against the individual rights of said employees.

> "The problem in any case is to arrive at a balance between the interest of the (employee) as a citizen, in commenting upon matters of public concern and the interest of the (government), as an employer, and promoting the efficiency of the public services it performs through its employees." 20 L. Ed. 2d 811, at 817.

Insofar as precisely where this balance should be struck, the Court does not, of course, set the boundaries between what is permissible regulation of activities and

what would be an impermissible infringement on the First Amendment rights of the citizen. The Court does, however, state:

> "Although Congress is free to strike a different balance than it has, if it so chose, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitation on partisan political activities now contained in the Hatch Act." 37 L. Ed. 2d 796, at 808.

We would thus appear to be presented with a two-faceted fact question of (1) whether the balance which has been struck by the General Assembly in KRS 90.220(2) "is sustainable by the obviously important interests sought to be served by the limitations", and (2) whether the Court of Appeals' decision in holding that the statute prohibits a Civil Service employee from campaigning for and holding office as well as the activities expressly prohibited, was a proper construction of the statute.

As to the latter question, it has been held a number of times that the Supreme Court will not question the construction given to a state statute by the highest state court. *Oklahoma Tax Commission* v. *Texas Company,* 336 U. S. 342, 93 L. Ed. 721, and 69 S. Ct. 561 (1948), *Great Northern Railway Company* v. *Sunburst Oil and Refining Co.,* 287 U. S. 358, 77 L. Ed. 358, —— S. Ct. ——, *Supreme Lodge, K.P.* v. *Meyer,* 265 U. S. 33, 68 L. Ed. 888, 44 S. Ct. 432 (1923). Therefore, unless the statute is held to violate the federal constitutional rights of an individual or group of individuals, the

Supreme Court will not strike down the construction of a state statute by the highest court of the state. Consequently, if the state statute here in question is found to be constitutional by the balancing test mentioned in the *Letter Carrier* case, then the Supreme Court must uphold the decision of the Court of Appeals. Neither the express wording of the statute in question nor the construction of the statute by the Kentucky courts infringe any more upon the rights of the individual employees than did the federal statute in the *Letter Carrier* case, the Hatch Act. There is, however, a fact question as to whether or not the Kentucky statute *does* infringe further upon the right of the employee than the Hatch Act, and the answer will depend upon the Supreme Court's comparison of the wording of the two statutes. The Kentucky Court of Appeals deals with this question in the final penultimate paragraphs of their opinion, and their conclusion is that the statute may "in plain and understandable language forbid a civil service employee from becoming a partisan candidate for, or for campaigning for, an elective public office." The Court of Appeals has thus construed the statute as being in compliance with the holding in the *Letter Carrier* case, and therefore constitutional.

In regard to the objection as to the vagueness or overbreadth of the Kentucky statute, the Kentucky Court of Appeals has stated:

> "This Court is of the opinion that the implication in KRS 90.220(2) of the prohibition against

candidacy is so obvious that the prohibition may be considered to be expressed in plain and understandable language within the requirements of the *Letter Carrier* case." 518 S. W. 2d 777, at 779.

CONCLUSION

It is obvious from the above cited cases concerning the court's jurisdiction and the case of *U. S. Civil Service Commission* v. *National Association of Letter Carriers, supra,* that this court is without jurisdiction and even if so, the law clearly favors the respondent in this case. Therefore it is respectfully submitted that this Honorable Court deny the writ of certiorari.

Respectfully submitted,

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